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No. 00-1378

Supreme Court, U.S.
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In The

Supreme Court of the United States

HUGH STEWART, KAMERON HYDE, and SHERRY HORN,

Petitioners,

v.

THE BIRMINGHAM NEWS COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Alabama Supreme Court

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Alabama Supreme Court erred in finding that commercial contracts to purchase, distribute, and solicit subscriptions for newspapers in Alabama – newspapers which include national news stories and photographs supplied by news services located outside of Alabama; special features, supplements, news magazines, and commercial advertising inserts prepared and printed outside of Alabama; and promotional samples of products made outside of Alabama, and which newspapers are printed on paper purchased outside of Alabama with ink purchased outside of Alabama – involve interstate commerce and are therefore subject to the Federal Arbitration Act (the "FAA"), 9 U.S.C. §§ 1-16.

RULE 29.6 STATEMENT

All of the outstanding stock of Respondent, The Birmingham News Company ("The News"), is owned by Advanced Publications, Inc., a New York corporation.

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JURISDICTION

While The News denies that certiorari would be appropriate in this case, it agrees that the case raises issues arising under the Constitution of the United States. 29 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The News agrees that this case involves the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, and the FAA, 9 U.S.C. §§ 1-16. The issues raised in this case may also involve the Necessary and Proper Clause, U.S. Const. art. I, § 8, cl. 18, which provides that Congress shall have the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution" all of the powers vested by the Constitution in the federal government.

THE FACTS OF THE CASE

This case arises out of an agreement by each of the Petitioners, Hugh Stewart ("Stewart"), Kameron Hyde ("Hyde"), and Sherry Horn ("Horn"), to serve as dealers and distributors of the largest daily newspaper in the state of Alabama, *The Birmingham News*. Stewart, Hyde, and Horn entered into written contracts with The News, the terms of which are substantially identical. Each agreement provides that the dealer will purchase a sufficient number of newspapers from The News to supply all home subscribers and all customers at newsstands, stores, news racks, or other places where newspapers

may be sold within an area of primary responsibility for a period of one year. Each agreement also requires that the dealer "make regular and prompt deliveries on the date of publication of complete newspapers intact, *including preprints, supplements, and inserts designated by [The News].*" (Emphasis added.)

The "preprints, supplements, and inserts" to which each agreement refers include national news magazines. One such magazine, entitled *Parade*, is a weekly publication featuring stories on a range of topics, including health, beauty, entertainment, and other items of personal interest. *Parade* is published outside of Alabama. Issues of the magazines are prepared, printed, and shipped into Alabama, as well as other states, for distribution along with daily newspapers like *The Birmingham News*. Another such magazine, called *React*, was targeted to teenagers. It was also published outside of Alabama and prepared, printed, and shipped into Alabama, as well as other states, for distribution along with daily newspapers.[1]

The "preprints, supplements, and inserts" also include a substantial quantity of commercial advertising inserts for national retail chains such as Sears, Home Depot, and others. These are separate, multipage inserts, some of which are bound or folded like a magazine, featuring a variety of products for sale. The advertising inserts are also prepared and printed by companies located outside of Alabama and shipped into the state for distribution.

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[1] *React* is no longer published.

The "preprints, supplements, and inserts" also include special features such as the Sunday comics. The Sunday comics are prepared in their entirety by a separate company located outside of Alabama.

In addition to being required to deliver the newspaper, the preprints, the supplements, and the inserts described above, Stewart, Hyde, and Horn were each required by their agreements to maintain reasonable levels of circulation in their areas of primary responsibility and to use their best efforts to maintain that circulation and to solicit new customers and subscribers. Maintaining circulation is described in each agreement as being "of the essence."

In 1998, the business relationships between Stewart, Hyde, and The News deteriorated. The News became dissatisfied with Stewart's and Hyde's performance. It ultimately terminated Stewart's agreement and elected not to renew Hyde's agreement.

In December 1998, The News notified Horn that it would not renew her agreement in its then-present format when it expired early in 1999. Although The News offered her a new agreement, Horn refused to sign, contending that The News had no right to change any of the terms of her current agreement. She contended that she had purchased the right to distribute *The Birmingham News* from a previous dealer in her area and that, despite the provision in her agreement with The News that limited its term to one year, The News was obligated to renew it without change as long as she was performing satisfactorily.

On July 27, 1999, Horn filed a civil action against The News in the Circuit Court for Jefferson County, Alabama, alleging that, by exercising its contractual right not to renew the agreement, The News had breached it, committed fraud, conspired to commit fraud, violated the Alabama Antitrust Act, had been unjustly enriched, had tortiously interfered with Horn's business, and was guilty of deceptive trade practices. Three days later, Stewart and Hyde filed virtually identical actions against The News.

The News filed a motion to stay the civil action and to compel arbitration in each case, based on an arbitration provision contained in each agreement. Although under Alabama law predispute arbitration agreements are generally unenforceable, *see* ALA. CODE § 8-1-41(3) (1993), a party can nevertheless enforce such an agreement if it can show that the transaction at issue involves interstate commerce and that Alabama's law would therefore be preempted by the FAA. *See Southland Corp. v. Keating*, 465 U.S. 1 (1984). The FAA provides in pertinent part that "a written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2.

With its motions, The News submitted to the trial court an affidavit from its Circulation Director, Toby Pearson, in which he described the extensive interstate activity involved in the performance of the agreements at issue in this case. In addition to describing the origin of the news supplements, news magazines, and commercial advertising inserts, Mr. Pearson described how The News

obtains a significant portion of national news content and photographs from outside the State under agreements with news services such as the Associated Press, Universal Press, Knight Ridder, Tribune, and King Features. He described how The News buys the paper on which *The Birmingham News* is printed from companies in Tennessee and Mississippi and how it buys its ink from a company in New Jersey. He explained that many of the advertisements that appear in the pages of *The Birmingham News* are designed by advertising agencies located outside of Alabama and that, from time to time, The News also includes advertisers' product samples with the newspapers that it sells to dealers such as Stewart, Hyde, and Horn and that they then distribute to subscribers. Those samples are typically shipped to The News from advertisers who are located outside of Alabama.[2]

Different trial court judges in Jefferson County heard The News' motions. The Stewart and Hyde cases were assigned to, and consolidated before, one judge, and the Horn case was assigned to another. The trial court in the Stewart and Hyde cases granted the motions to compel arbitration. The trial court in the Horn case denied the motion, finding an insufficient connection to interstate commerce. The parties then sought review of all three cases by the Alabama Supreme Court.

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[2] Mr. Pearson also stated in his affidavit that *The Birmingham News* is sold in several other states.

THE ARGUMENTS ON APPEAL

On appeal to the Alabama Supreme Court, The News made three arguments: First, it argued that the transactions at issue involved "commerce in fact" as that term was used by this Court in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995). Like the petitioner in *Allied-Bruce*, The News used materials and supplies from outside the State of Alabama to perform each agreement, and its business is multistate in nature. Second, The News argued that the national news content, features, supplements, news magazines, and advertising inserts were in the "flow" of interstate commerce, with the dealer acting as an inseparable and integral part of that flow. *See Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 195 (1974) (defining "in commerce" as related to the "flow" and defining the "flow" to include "the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer"). Third, The News argued that the transactions at issue affected interstate commerce directly and substantially, especially when considered in the aggregate. *See United States v. Lopez*, 514 U.S. 549 (1995); *Wickard v. Filburn*, 317 U.S. 111 (1942). The News argued that the performance of news dealer agreements necessarily affects the purchase by The News of paper, ink, and other materials; the purchase and sale of goods advertised in the newspaper; the purchase of advertising space in *The Birmingham News*; and, ultimately, The News' very ability to gather and disseminate national and international news.

Stewart, Hyde, and Horn argued, just as they have argued here, that the contracts at issue involve no more

than the local delivery of newspapers. Citing *United States v. American Building Maintenance Industries*, 422 U.S. 271 (1975), they argued that they purchased complete newspapers from The News, and not the component parts, and that any flow of interstate commerce ceased when the various component parts of the newspaper were delivered to The News. They also argued that, to the extent their activity had any effect on interstate commerce, that effect was not "substantial." *See United States v. Lopez*, 514 U.S. at 558-59.

THE DECISION OF THE ALABAMA SUPREME COURT

The Alabama Supreme Court found that the agreements at issue did involve interstate commerce. It found that the FAA applied and that the motion to compel arbitration in each case should have been granted.

The Alabama Supreme Court's analysis began with this Court's holding in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995). In *Allied-Bruce*, this Court interpreted the scope of Section 2, the FAA's coverage provision. Relying on the background and purpose of the FAA and the words used in the statute, this Court held that the phrase "a contract evidencing a transaction involving commerce" should be read broadly, extending the FAA's reach "to the limits of Congress' commerce clause power." 513 U.S. 268.[3] According to this Court, the

[3] Within the last few weeks, this Court repeated, and relied on, the interpretation of Section 2 set out in *Allied-Bruce*. *See Circuit City Stores, Inc. v. Adams*, 69 U.S.L.W. 4195 (2001).

word "involving," as used in Section 2, should be read as the functional equivalent of "affecting." It covers not only those activities that are "in the flow" of interstate commerce, but also those activities that "affect" interstate commerce. 513 U.S. at 273-74.

The Alabama Supreme Court then reviewed two cases that had previously analyzed the relationship between interstate commerce and the local distribution of newspapers, *Lorain Journal v. United States*, 342 U.S. 143 (1951), and *Evening News Publishing Co. v. Allied Newspaper Carriers of New Jersey*, 263 F.2d 715 (3rd Cir. 1959), *cert. denied*, 360 U.S. 929 (1959). In *Lorain Journal*, this Court analyzed the interstate activity of a daily newspaper located in Lorain, Ohio:

> While but 165 out of the Journal's daily circulation of over 20,000 copies are sent out of Ohio, it publishes not only Lorain news but substantial quantities of state, national and international news. It pays substantial sums for such news and for feature material shipped to it from various parts of the United States and the rest of the world. It carries a substantial quantity of national advertising sent to it from throughout the United States. Shipments and payments incidental to the above matters, as well as the publisher's purchases of paper and ink, involve many transactions in interstate or foreign commerce.

342 U.S. at 151. Concluding that the newspaper was engaged in interstate commerce, the Court wrote as follows:

> There can be little doubt today that the immediate dissemination of news gathered from

> throughout the nation or the world by agencies specially organized for that purpose is a part of interstate commerce. The same is true of national advertising originating throughout the nation and offering products for sale on a national scale. The local dissemination of such news and advertising requires continuous interstate transmission of materials and payments, to say nothing of the interstate commerce involved in the sale and delivery of products sold.
>
> * * *
>
> ***The distribution within Lorain of the news and advertisements transmitted to Lorain in interstate commerce for the sole purpose of immediate and profitable reproduction and distribution to the reading public is an inseparable part of the flow of the interstate commerce involved.***

342 U.S. at 151-52 (emphasis added).

In *Evening News*, the U.S. Court of Appeals for the Third Circuit found that news dealers – dealers like Stewart, Hyde, and Horn – were an "inseparable part of the flow of the interstate commerce involved." In that case, a group of news dealers tried to force a newspaper to eliminate the home delivery of some of its newspapers by newsboys. The newspaper filed suit against the dealers, alleging that their actions violated Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2). The trial court agreed and entered an injunction against the dealers. On appeal, the dealers argued that the newspaper had failed to show an unlawful conspiracy to restrain interstate commerce. They emphasized the intrastate nature of their relationship with the newspaper and their delivery of newspapers only within their home state. The Court of

Appeals disagreed with the dealers and affirmed the trial court, holding as follows:

> The truncated argument advanced would have us forget completely that interstate commerce is an inseparable, indispensable part of this . . . newspaper. The News does furnish neighborhood, city, county and state news to its readers. And by far the major portion of its sales are in New Jersey. But an essential element of its being (perhaps considering its territory and the present state of this world of ours its most essential element) is the obtaining, dissemination and interpretation of national and world-wide news. Intrastate advertising is necessary to the economic life of the paper and necessary to its readers. Interstate advertising affects the paper and its readers to a lesser degree but affect them it does appreciably. *To place that news and advertising in the hands of New Jersey people requires, as the United States Supreme Court said in [Lorain], "continuous interstate transmission of materials and payments to say nothing of the interstate commerce involved in the sale and delivery of product sold." The end result, the distribution of the News, as a complete newspaper containing those news items and advertisements, to its reading public in Newark or any other New Jersey area is, as the Court held in [Lorain] " . . . an inseparable part of the flow of the interstate commerce involved."*

263 F.2d at 717 (emphasis added). The court found that "the home delivery of the News is an integral part of the interstate operation." 263 F.2d at 717.

The Alabama Supreme Court agreed with the Court of Appeals' application of *Lorain Journal* and found that the cases of Stewart, Hyde, and Horn were virtually indistinguishable. It concluded that the FAA therefore applied. Because the court found that Stewart, Hyde, and Horn were themselves engaged "in" commerce, or were integral parts of the "flow" of interstate commerce, the court did not find it necessary to decide whether the activity of dealers and distributors like Stewart, Hyde, and Horn "affect," substantially or otherwise, interstate commerce.

REASONS WHY THE WRIT SHOULD BE DENIED

The sole issue argued before the Alabama Supreme Court was whether the activity of Petitioners – activity that is purely commercial – would be within the authority of Congress to regulate and therefore subject to the FAA. Petitioners did not argue that *Allied-Bruce* was wrongly decided or, for that matter, that the FAA should not apply in state courts. *See Southland Corp. v. Keating*, 465 U.S. 1 (1984). Petitioners focused only on the scope of Congress' authority to regulate commercial activity. That subject has been well-defined by longstanding precedent of this Court. Even a cursory review of this Court's cases, including *Lopez* and *United States v. Morrison*, 529 U.S. 598 (2000), shows that the activity of news dealers such as Stewart, Hyde, and Horn is well within the authority of Congress to regulate pursuant to the Commerce Clause.

The petition does not raise any new or important issues. The petition does not demonstrate any substantive

conflict between the decision of the Alabama Supreme Court and the decision of a U.S. Court of Appeals or another state court of last resort. For these and the other reasons described in greater detail below, this petition is due to be denied.

I. The Alabama Supreme Court Did Not Err When It Found that the Distribution of Newspapers Was an Inseparable Part of the Flow of the Interstate Commerce Involved.

Much of the Petitioners' argument in this case is based upon their reading of *Lopez*. For reasons that will be discussed below in section II, *Lopez* does not change the outcome in this case. *Lopez* does, however, provide a useful framework for analyzing whether the activity at issue here would be within the authority of Congress to regulate.

In *Lopez*, this Court held that the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A), was an unconstitutional attempt by Congress to exercise its power to regulate activities in and affecting interstate commerce. The act prohibited an individual from knowingly possessing a firearm within one thousand feet of the grounds of a school. In its opinion, the Court explained that it had previously identified "three broad categories" of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of channels of interstate commerce. Second, "Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from

intrastate activities." 514 U.S. at 557. Finally, Congress's commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce. *Id.*

The Alabama Supreme Court's decision now before the Court fits within the second *Lopez* category – the broad general category of cases that recognize the authority of Congress to regulate persons or things that are in some sense participating "in" interstate commerce. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-5, at 829 (3d ed. 2000) ("Although the Court might more comfortably have described it as a separate category, *Lopez* located the regulation of 'persons or things "in" interstate commerce,' or 'participating in' such commerce, in the instrumentalities branch of the Court's Commerce Clause doctrine."). The substantial effects test need not apply to cases like this one, where the actual persons and things involved are themselves within the flow of commerce. Such persons and things, by definition, substantially affect – because they are components of – interstate commerce. *See id.* § 5-5, at 827.

The Alabama Supreme Court is certainly not the first court to equate or define "in commerce" as related to the "flow" of commerce. In 1905, Justice Holmes wrote as follows:

> [C]ommerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do

> so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, *the current thus existing is a current of commerce among the States*, and the purchase of the cattle is a part and incident of such commerce.

Swift and Co. v. United States, 196 U.S. 375, 399 (1905) (emphasis added). In 1943, the Court again discussed the movement of goods in a current of interstate commerce and the authority of Congress to regulate it, as well as those who participate in it. *See Walling v. Jacksonville Paper Co.*, 317 U.S. 564 (1943). In *Walling*, the Court addressed the reach of the Fair Labor Standards Act. It determined that the flow of interstate commerce, and therefore the reach of that Act, did not necessarily cease once goods were delivered to a wholesaler located in the state of destination:

> It is clear that the purpose of the [Fair Labor Standards Act] was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce. There is no indication . . . that, once the goods entered the channels of interstate commerce, Congress stopped short of control over the entire movement of them until their interstate journey was ended. No ritual of placing goods in a warehouse can be allowed to defeat that purpose. The entry of the goods into the warehouse interrupts but does not necessarily terminate their interstate journey. A temporary pause in their transit does not mean that they are no longer "in commerce" within the meaning of the Act. As in the case of an agency . . . if the halt in the movement of the goods is a convenient intermediate step in the process of getting them to

> their final destinations, they remain "in commerce" until they reach those points. Then there is a practical continuity of movement of the goods until they reach the customers for whom they are intended. That is sufficient. Any other test would allow formalities to conceal the continuous nature of the interstate transit which constitutes commerce.

317 U.S. at 567-68. Finding that the wholly intrastate delivery of various paper products (including newsprint) was subject to Congressional regulation, the Court held that the products remained "in commerce" because they had been ordered pursuant to pre-existing contracts or understandings with customers. Under such circumstances,

> [a] break in their physical continuity of transit is not controlling. If there is a practical continuity of movement from the manufacturers or suppliers without the state, through respondent's warehouse and on to customers whose prior orders or contracts are being filled, the interstate journey is not ended by reason of a temporary holding of the goods at the warehouse. The fact that respondent may treat the goods as stock and trade or the circumstance that title to the goods passes to respondent on the intermediate delivery does not mean that the interstate journey ends at the warehouse. The contract or understanding pursuant to which goods are ordered, like a special order, indicates where it was intended that the interstate movement should terminate.

317 U.S. at 568-69. *Walling* stands for the proposition that temporary stops in an interstate journey of merchandise

to a predetermined destination do not necessarily interrupt the flow of commerce. *See Hardrives Co., Inc. v. East Coast Asphalt Corp.*, 329 F.2d 868 (5th Cir. 1964), *cert. denied*, 379 U.S. 903 (1964); *Stewart-Jordan Distrib. Co. v. Tobin*, 210 F.2d 427 (5th Cir. 1954), *cert. denied*, 347 U.S. 1013 (1954).

The Alabama Supreme Court's decision is consistent with the principles described in *Walling*. The newspapers distributed by Stewart, Hyde, and Horn were subject to pre-existing orders in the form of subscriptions. Those subscriptions required that Stewart, Hyde, and Horn deliver news, features, news magazines, and commercial advertising inserts (all of the "preprints, supplements, and inserts" designated for delivery pursuant to their agreements) in a timely manner on the day of publication to the subscriber. Much of the news content, many of the photographs, and virtually all of the news magazines, special features, and commercial advertising inserts were published and prepared in their entirety outside of Alabama for distribution, without change, to the subscriber. As this Court held in *Walling*, the pre-existing order – the subscription – by the ultimate subscriber "indicates where it is intended that the interstate movement should terminate." *Walling*, 317 U.S. at 568-69. To hold that the purpose for the production of such news and advertising was for it to be delivered to The News would be to "allow formalities to conceal the continuous nature of the interstate transit which constitutes commerce." 317 U.S. at 567-68.

The Alabama Supreme Court's decision is also consistent with the conclusions reached by many other courts. *See Webb v. Athens Newspapers, Inc.*, 999 F. Supp. 1464 (M.D. Ga. 1998) (holding that district managers of a

newspaper in Georgia were "engaged in" interstate commerce when they delivered newspapers to readers in Georgia because the newspapers contained supplements and other material printed outside of Georgia); *Dahl v. The Hurst Corp.*, 1972 U.S. Dist. LEXIS 10715 (C.D. Cal. 1972) (holding that a news dealer was an inseparable part of the flow of interstate commerce because the newspaper he distributed contained news, feature material, comics, and other information that had moved in interstate commerce); *see also Wirtz v. Universal Advertising Service*, 258 F. Supp. 542 (N.D. Okla. 1966) (holding that the distribution of advertising circulars, handbills, and similar printed matter was in commerce); *Schultz v. Circulation Sales, Inc.*, 301 F. Supp. 937 (E.D. Mich. 1969) (focusing on the solicitation of newspaper subscriptions – "the horse which pulls the cart of advertising" – the court found that "[i]n the totality of the flow of news and advertising and its dissemination locally, clearly those who solicit subscriptions are 'so directly and vitally related to the functioning [of a newspaper's interstate commerce] as to be a part of it' ").

A. The Alabama Supreme Court Correctly Concluded that *American Building Maintenance* Is Distinguishable from this Case.

Stewart, Hyde, and Horn relied primarily on *United States v. American Building Maintenance Industries*, 422 U.S. 271 (1975), to argue that any flow of interstate commerce ceased at The News. The Alabama Supreme Court, however, correctly concluded that the facts of *American Building Maintenance* were distinguishable from those of this case.

In *American Building Maintenance*, this Court concluded that a janitorial services company, which cleaned the office of a company that was engaged in interstate commerce, was not itself "engaged in commerce" for purposes of Section 7 of the Clayton Act. The activities of the janitorial services company were different from the activities of commercial distributors such as Stewart, Hyde, and Horn. The janitorial services company did not purchase products for the express purpose of distributing them to consumers pursuant to pre-existing orders or understandings. Stewart, Hyde, and Horn, on the other hand, were indispensable links in the chain of distribution of out-of-state news, features, news magazines, and advertising to the ultimate subscriber. If Stewart, Hyde, and Horn breached their agreements, the entire purpose for producing such news, features, and advertising would be thwarted.[4] The News could continue to function if its office were not clean; The News' ability to function and to conduct interstate commerce would be fundamentally and substantially impaired, however, if its newspapers were not delivered to subscribers or if dealers failed to

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[4] For that reason, the facts of this case are also distinguishable from those of *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974). *Gulf Oil* dealt with the manufacture and distribution intrastate of asphaltic concrete, a product made by combining and heating various ingredients. The market for asphaltic concrete was entirely local, and the ingredients were all obtained intrastate. There was no contention in that case that the local market in asphaltic concrete was an integral part of the interstate market in other component commodities or products. *See* 419 U.S. at 196 ("[n]or does [Copp] contend that the local market in asphaltic concrete is an integral part of the interstate market in other component commodities or products").

use their best efforts to maintain and grow circulation in their respective areas.

B. The Alabama Supreme Court Correctly Concluded that the Flow Was Not Interrupted by Changes in the Product.

Stewart, Hyde, and Horn also argued that the flow of interstate commerce ceased at The News because they purchased complete newspapers, not component parts, from The News.[5] They argued that the items moving in interstate commerce changed form, apparently just as the ingredients in sausage making change form as the sausage is made. The news magazines, advertising inserts, and features did not change form. They were not subjected to a manufacturing process that changed their character in any appreciable way. *See A & P v. FTC*, 557 F.2d 971 (2nd Cir. 1977), *rev'd on other grounds*, 440 U.S. 69 (1979); *Dean Milk Co. v. FTC*, 395 F.2d 696 (7th Cir. 1968); *Foremost Dairies, Inc. v. FTC*, 348 F.2d 674 (5th Cir. 1965), *cert. denied*, 382 U.S. 959 (1965). Moreover, Petitioners' argument ignored the fundamental nature and purpose of a daily metropolitan newspaper containing national news content and

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[5] In an attempt to support this argument, Stewart, Hyde, and Horn state in their petition that they purchased "assembled" newspapers from The News. There was no evidence in the record, however, about who actually "assembled" the newspapers. Although Stewart, Hyde, and Horn did state in affidavits that they purchased "complete" newspapers, none of them addressed whether they themselves had assembled or, in the parlance of the business, "stuffed" the newspapers.

commercial advertising and their roles as commercial distributors. As was explained in *Lorain Journal* and *Evening News*, an essential element of a newspaper's enterprise is the obtaining and dissemination of national and worldwide news. The product here is not merely some combination of paper and ink (although the source of those materials is important). The product is information. *See Reno v. Condon*, 528 U.S. 141 (2000) (describing motor vehicle information as an article of commerce). A substantial amount of that information flows through Stewart, Hyde, and Horn in an unaltered condition, in the form of news stories and photographs from out-of-state entities such as the Associated Press.

The only case cited by Petitioners that even remotely supports their position is the 1943 decision of the U.S. Court of Appeals for the Fourth Circuit in *Schroepfer v. A.S. Abell Co.*, 138 F.2d 111 (4th Cir. 1943). In that case, the Court of Appeals held that "rack men," individuals whose sole responsibility was the delivery of newspapers to retail locations, were not engaged in interstate commerce. *Schroepfer*, however, is not in conflict with the decision of the Alabama Supreme Court for several reasons. First, *Schroepfer* was decided before this Court decided *Lorain Journal*. *Schroepfer*'s continuing validity is, therefore, questionable. Second, *Schroepfer* is factually distinguishable from this case. *Schroepfer* did not involve news dealers, individuals who, like Petitioners, are responsible not only for the delivery of newspapers to retail locations, but also for home delivery, maintaining circulation, and soliciting subscriptions ("pre-existing orders") for the newspaper. *Schroepfer* also did not involve the delivery of news magazines, commercial advertising inserts, and other features prepared in their

entirety outside of the state and distributed, without change, to the ultimate subscriber.

In summary, the Alabama Supreme Court's opinion treads within the boundaries of this Court's Commerce Clause cases. It fits within the second of the three general categories of Commerce Clause cases that this Court recognized in *Lopez*. The Alabama Supreme Court applied a correct, longstanding, and well-reasoned rule of law to the facts of this case. Stewart, Hyde, and Horn are merely unhappy with the result.

II. Even if the Distribution of Newspapers Was Not an Inseparable Part of the Flow of Interstate Commerce, It Nevertheless Had a "Substantial Effect" on Interstate Commerce.

Stewart, Hyde, and Horn now argue that the Alabama Supreme Court applied the wrong analysis when it decided this case. They contend that the Alabama Supreme Court should have determined whether the activity at issue in this case fits within *Lopez's* third category – those cases upholding the authority of Congress to regulate commercial activity that in the aggregate substantially affects interstate commerce. They believe that, in view of this Court's decisions in *Lopez* and *Morrison*, the performance of their contracts should not be deemed to have substantially affected interstate commerce.

Stewart, Hyde, and Horn read far too much into this Court's decisions in *Lopez* and *Morrison*. As explained above, *Lopez* dealt with the constitutionality of a federal criminal statute, the Gun-Free School Zones Act, that by its terms had nothing to do with commerce or any sort of economic enterprise. *Morrison* dealt with the constitutionality of another federal criminal statute, the Violence

Against Women Act of 1994, that also had nothing to do with commerce or any sort of economic enterprise.

A fair reading of *Lopez* shows that it did not change the level of influence on interstate commerce that commercial activity must exert before it becomes subject to federal regulation. In a concurring opinion in *Lopez*, Justice Kennedy wrote that the case did not alter the Court's "practical conception of commercial regulation" and that Congress may "regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy." *Lopez*, 514 U.S. at 573-74 (Kennedy, J., concurring). When this Court "canvassed and clarified [its] case law governing this third category of Commerce Clause regulation," *see Morrison*, 529 U.S. at 609, it wrote as follows:

> We have upheld a wide variety of congressional acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce. Examples include the regulation of intrastate coal mining; [*Hodel v. Virginia Surface Mining and Reclamation Assoc., Inc.*, 452 U.S. 264 (1981)] intrastate extortionate credit transactions, [*Perez v. United States*, 402 U.S. 146 (1971)] restaurants utilizing substantial interstate supplies, [*Katzenbach v. McClung*, 379 U.S. 294 (1964)], and production and consumption of home-grown wheat, *Wickard v. Filburn*, 317 U.S. 111, 87 L. Ed. 122, 63 S. Ct. 82 (1942). These examples are by no means exhaustive, but the pattern is clear. Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.

514 U.S. at 559-60. The Court cited as examples of commercial activity having a "substantial" effect on interstate commerce some of the most far-reaching cases in the history of the Commerce Clause: *Katzenbach v. McClung*, for example, which held that a restaurant's sale of food to local patrons – an intrastate transaction between an Alabama resident and an Alabama business – substantially affected interstate commerce and could be regulated because the restaurant obtained meat from an Alabama company that, in turn, obtained the meat from outside of Alabama; and *Wickard v. Filburn*, which held that the activities of a farmer who raised wheat for his own personal consumption substantially affected interstate commerce. In *Wickard* the Court had found that home-grown wheat would have a "substantial" influence on price and market conditions and in that sense would compete with wheat in commerce. 317 U.S. 111, 128 (1942). Nothing in *Lopez* called the outcomes of these cases into question. *See* 514 U.S. at 573 (Kennedy, J., concurring) ("[t]hese and like authorities are within the fair ambit of the Court's practical conception of commercial regulation and are not called in question by our decision today").[6]

Like *Lopez*, *Morrison* also did not change the level of influence on interstate commerce that commercial activity

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[6] The Court also did not question the aggregation or cumulative effects feature of the substantial effects test, at least as it applied to purely economic activity. *See Wickard v. Filburn*, 317 U.S. 111 (1942); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). Following the decisions of this Court, Alabama law also views economic activity in the aggregate to determine whether it affects interstate commerce. *Tefco Finance Co. v. Green*, No. 1991402 (Ala. March 16, 2001).

must exert before it becomes subject to federal regulation. This Court's decision in *Morrison* did not question the broad authority of Congress to regulate purely commercial activity. Following the commercial versus non-commercial distinction drawn by the Court in *Lopez*, the Court again cited with approval cases such as *Hodel*, *Perez*, *McClung*, and *Wickard* – the "pattern of analysis" described in *Lopez* which consistently sustained the authority of Congress to regulate economic activities that, although local in nature, have a substantial aggregate effect on interstate commerce. 529 U.S. at 610. Quoting *Lopez*, the Court again concluded that "[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." 529 U.S. at 610.

The present case involves the kind of commercial activity that the Court recognized in *Lopez* and *Morrison* as well within the authority of Congress to regulate. In fact, the aggregate or cumulative effect of the commercial activity at issue here is so obvious as to be "visible to the naked eye." *See Lopez*, 514 U.S. at 563.

Stewart, Hyde, and Horn try very hard to characterize their agreements as involving nothing more than the local delivery of newspapers. The news dealer agreement at issue in this case, however, requires more than the delivery of newspapers. The News must supply the papers, and the dealer must purchase them. That basic purchase and sale agreement has undeniable economic effects. The purchase and sale of newspapers affects the purchase by The News of the paper, ink, and other materials necessary to prepare the newspaper. The News obtains those materials from outside of Alabama. *See*

Schroepfer v. A.S. Abell Co., 138 F.2d 111, 114 (4th. Cir. 1943) (in this case cited by Petitioners, the court wrote that "[w]hen the news printed or the material used in the papers is transported across state lines interstate commerce is necessarily 'affected' by anything that affects the publication and sale of papers"). The purchase and sale of newspapers also has an effect on the ability of The News to sell its services to advertisers located outside of Alabama. The circulation of a newspaper bears a direct relationship to its ability to generate advertising sales. *See Schultz v. Circulation Sales, Inc.*, 301 F. Supp. 937 (E.D. Mich. 1969). Finally, the distribution of the advertisements themselves, as well as product samples, can reasonably be expected to affect the purchase and sale of goods in interstate commerce. Indeed, the very purpose for distributing advertisements is to affect the purchase and sale of goods in interstate commerce.

CONCLUSION

The decision of the Alabama Supreme Court should not be surprising or controversial. The case does not involve the kind of activity at issue in *Lopez* or *Morrison* – non-commercial, criminal conduct taking place wholly within a state, the regulation of which would raise serious questions about the balance of federal and state power. To the contrary, the activity at issue here – purely commercial conduct within the "flow" of interstate commerce – fits easily within the power of Congress to regulate under the Commerce Clause. Even if the commercial activity at issue here was not properly regarded as being "in" commerce or in the "flow" of commerce, it still had

an undeniable and "substantial effect" on commerce. For that reason alone, the result reached by the Alabama Supreme Court is correct and should be left undisturbed. For all of the reasons described in this brief, the petition should be denied.

Respectfully submitted,

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